IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1758

THE YPSILANTI PRESS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled case (its Case No. 75-1871) entered on April 8, 1976.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 8, 1976. This petition is filed within ninety (90) days thereafter, as required by Title 28, Paragraph 2101, Subparagraph c of the United States Code, 28 U. S. C. § 2101(c). Jurisdiction of this Court is invoked under Title 28, Paragraph 1254, Subparagraph 1 of the United States Code, 28 U. S. C. § 1254(1). Jurisdiction of the court

below was premised upon Section 10(f) of the National Labor Relations Act, as amended, Title 29, Section 160(f) of the United States Code, 29 U. S. C. § 160(f).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto as Appendix A.

LAW INVOLVED.

This case concerns rights of procedural due process guaranteed by the Fifth Amendment to the United States Constitution. It also involves the National Labor Relations Act, as amended, Title 29, Section 141 *et seq.* of the United States Code, 29 U. S. C. §§ 141 *et seq.*, and specifically 29 U. S. C. §§ 158(a)(1) and (5). Also involved are the Rules and Regulations of the National Labor Relations Board, Title 29, Chapter 1, Subpart c, Sections 102.60 *et seq.* of the Code of Federal Regulations, 29 C. F. R. §§ 102.60 *et seq.*, and specifically 29 C. F. R. §§ 102.69(d) and (f). Relevant statutory and regulatory provisions are set forth in the statutory appendix attached hereto as Appendix B.

QUESTIONS PRESENTED.

A. Whether the National Labor Relations Board's order 219 NLRB No. 30 (1975)[1] was properly enforced by the United States Court of Appeals for the Sixth Circuit in light of the failure of the National Labor Relations Board to conduct a hearing to determine the effects of pre-election misconduct committed by agents of Newspaper Drivers and Handlers Local No. 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[2] and others upon the representation

1. A copy of this order is attached hereto as Appendix C.
2. Hereinafter "Teamsters Local 372" or "Union."

election held in National Labor Relations Board Case No. 7-RC-12600?

B. Whether the National Labor Relations Board's order 219 NLRB No. 30 (1975) was properly enforced by the United States Court of Appeals for the Sixth Circuit in light of pre-election misconduct committed by agents of Teamsters Local 372 and others in National Labor Relations Board Case No. 7-RC-12600?

STATEMENT OF THE CASE.

On August 14, 1974, Teamsters Local 372 filed a representation petition with the National Labor Relations Board seeking to represent district managers employed by Petitioner. On October 23, 1974, the Regional Director of Region Seven of the National Labor Relations Board issued, after hearing, a Decision and Direction of Election for a unit of all full and regular part-time district managers employed by Petitioner, excluding from the unit two persons employed by Petitioner as supervisors. An election scheduled for November 22, 1974.

On November 18, 1974, as part of its pre-election campaign, Teamsters Local 372 held a party for all unit employees at a local bowling alley. During the course of this meeting, the chief Union organizer stated that Petitioner knew who would vote for and who against the Union; that if the Union did not win the election, all Union sympathizers would be fired; and that one of the two supervisors excluded from the unit was a Union advocate who had been illegally fired because of Union activities. He stated that he would "almost guarantee" that this supervisor would be reinstated as a result of unfair labor practice charges filed by the Union.[3] At this point, a unit employee stated that the Union's organizer was correct and that

3. In fact, this supervisor had been discharged for drinking on the job and absenteeism. The National Labor Relations Board, on November 29, 1974, refused to issue a complaint after investigation of the Union's unfair labor practice charge.

Petitioner did know how the employees' sympathies stood. This employee has previously been one of Petitioner's supervisors and had participated, on behalf of management, in an organizing drive with Teamsters Local 372 only seven months earlier.

On November 22, just prior to the election and within earshot of the employees preparing to vote, the chief Union organizer told the NLRB agent conducting the election that Petitioner had threatened to fire employees if they voted in the election; that the election would thus be invalid; and that, if the Union lost, the election would be overturned and held again.[4]

Directly thereafter, the election was held with four votes cast for the Union; two against representation; and two votes challenged by the Union. Subsequently, both Petitioner and the Union filed objections to the election and voiced their positions on the challenged ballots. Petitioner's objections challenged the participation of two of its supervisors in the election campaign on behalf of the Union; questioned the statements made at the November 18 Union meeting to the effect that Petitioner intended to fire all unit employees if the Union did not prevail; and objected to the statements made by the Union organizer prior to the vote. Petitioner also objected to the total effect of this conduct upon the election.

On February 21, 1975, based upon an *ex parte* investigation conducted by a field agent, and without the benefit of a hearing, the Regional Director of Region Seven issued his "Supplemental Decision on Challenged Ballots and Objections to Conduct Affecting the Election, Revised Tally of Ballots and Certification of Representative." In that decision, the Regional Director upheld one Union electoral challenge and refused to rule on the other challenge because it had allegedly become nondeterminative in light of the ruling on the first challenge.

4. On November 6, 1974, the Union filed an unfair labor practice charge alleging that Petitioner had promoted an eligible employee from the bargaining unit to a supervisory position so as to deprive him of the right to vote in the election. This is the employee referred to by the Union organizer. On November 29, 1974, the Board dismissed this unfair labor practice.

With regard to supervisory activity in the pre-election campaign, the Regional Director found:

1. That two supervisors, and not unit employees, originally contacted the Union;
2. That these two supervisors arranged the initial organizational meeting with the Union, solicited employees to attend, and provided transportation for employees to the meeting;
3. That the supervisors solicited authorization cards from various employees; and
4. That one supervisor told at least one employee that Petitioner intended to fire all unit employees if the Union did not prevail.

Yet the Regional Director held that these findings did not even raise a *prima facie* case of electoral misconduct sufficient to warrant a hearing, relying almost exclusively upon his unsupported suppositions as to the "likely" or "probable" beliefs of unit employees in order to explain away the conduct in question.

Similarly, the Regional Director found that the Union organizer did, in fact, make the threatening and misleading statements described by Petitioner's witnesses, but held (without any factual support whatsoever) that Petitioner's employees had sufficient "independent knowledge" to evaluate these threats and misstatements and render them harmless. Additionally, the Regional Director did find that the Union organizer's remarks were accompanied by statements by a former supervisor lending credence to them, but completely failed to consider the effect of the former supervisor's statements in reinforcing the Union organizer's remarks.

Finally, the Regional Director found that although the Union's organizer did in fact make the pre-election statements in question, these statements were

> ". . . nothing more than an announced determination, albeit perhaps a bit premature and out of place, to utilize the Board's election procedures to their fullest."

At no point in his decision did the Regional Director consider the cumulative effect of all of these remarks in the context of the election campaign, and in particular failed to analyze the total impact of the numerous and obvious threats to job security which the Union used to win the election.

Petitioner filed a timely Request for Review of this Supplemental Decision with the National Labor Relations Board in Washington, contending that substantial and material issues of fact precluded summary dismissal of its objections without a hearing and that, as a matter of law, the objections warranted a new election. Petitioner's Request for Review was denied by telegram on April 4, 1975.

Petitioner thereafter refused to bargain with Teamsters Local 372 because it believed that the Board erred in denying its Request for Review and in certifying the Union in this case. After issuance of a complaint and transfer of the case to the NLRB for summary judgment, the Board issued its decision on July 18, 1975. Two members of the Board adhered to the prior finding that the Union was properly certified. However, NLRB Chairman Murphy did not agree and stated:

> "I would have granted review and directed a hearing on Employer's Objection 1; therefore, I cannot join my colleagues in finding that Respondent violated Section 8 (a)(5) in refusing to bargain."

On July 21, 1975, Petitioner initiated a proceeding to review this order in the United States Court of Appeals for the Sixth Circuit, contending that the Board improperly denied a hearing and that Petitioner's objections were valid as a matter of law. After submission of lengthy briefs, this case was orally argued to the Sixth Circuit on April 2, 1975. Less than one week later, in a three sentence conclusory opinion suggesting that the court's prime concern was to avoid being burdened with a somewhat complex case, the Sixth Circuit issued a blanket affirmance of the Board's order.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Conflicts with Decisions of Other Courts of Appeal.

There is substantial uniformity in almost all federal appellate court rulings specifying the circumstances in which the National Labor Relations Board is required to hold a hearing on post-election objections. Virtually all appellate courts agree that under the Board's Rules and Regulations and under the Fifth Amendment, where the objecting party presents a *prima facie* case of electoral misconduct tainting the "laboratory conditions" which must surround an election (*General Shoe Corp.*, 77 NLRB 124 (1948)), the Board is obliged to grant the objector a hearing.[5]

Prior applications of this standard to fact situations similar to that here have always resulted in a court order requiring the Board to hold a hearing. In no reported case has any federal appellate court allowed the Board or its appointed officials to make unsupported findings of fact as to the "likely" or "probable" state of mind of voters in order to explain away conduct which is *prima facie* objectionable. Stated another way, every appellate court confronted with this question has ruled that a hearing is required to elucidate all the circumstances in which the objectionable conduct occurred in order to provide the Board a proper framework for utilizing its expertise in gauging the effect of such *prima facie* objectionable conduct. As the Fifth Circuit accurately opined in *N. L. R. B.* v. *Smith Industries, Inc.*, 403 F. 2d 889, 895 (5th Cir. 1968):

> "[T]he problem in these representation proceedings is that we are dealing with the elusive concept of the subjective effect of objective union conduct on 'the minds of the voters,' and subjective as well as objective evidence

5. An extensive discussion of the cases utilizing this standard is found in Petitioner's initial brief to the court below, at 9-11. For the sake of brevity, this discussion is omitted from the Petition.

> may be sufficient to overturn the election. See Home Town Foods, Inc. v. N.L.R.B., 5th Cir., 1967, 379 F.2d 241, 244. An evaluation of the historic facts, without an inquiry into the surrounding circumstances, without viewing those facts cumulatively, and without an opportunity to directly observe and examine witnesses, may lead to erroneous legal conclusions. . . ."

This principle has been applied, for example, to the question of the extent of voters' "independent knowledge" which would supposedly enable them to evaluate questionable campaign statements. In four separate cases, the Fifth and Second Circuits have held that whether voters in fact possess such knowledge is itself grounds for a hearing.[6] Surely here, where the Board has relied heavily upon the alleged "independent knowledge" of the voters, a question which must be resolved after a hearing is presented.

Without unduly lengthening this Petition, suffice it to say that much of the Board's decision is based solely upon its guesses as to the "likely" or "probable" beliefs of employees—such as their perception of the degree of supervisory authority lodged in pro-union supervisors, the extent to which the pre-election discharge of a supervisor dissipated his influence over the voters, or the extent to which certain remarks may have been regarded by employees as the product of "special knowledge" on behalf of the speaker. There is no factual support for any of these conclusions in the record, and it is precisely to elucidate such facts that the federal appellate courts have required the Board to conduct a hearing. If a *prima facie* standard is to be applied in this area, as numerous courts have stated, then the Board should not undertake to guess away the effects of *prima facie* objectionable conduct without the benefit of a hearing. The Ninth Circuit recently

6. *N. L. R. B.* v. *Mr. Fine, Inc.*, 516 F. 2d 60, 63-64 (5th Cir. 1975); *Henderson Trumbull Supply Co.* v. *N. L. R. B.*, 501 F. 2d 1224, 1228-29 (2d Cir. 1974); *N. L. R. B.* v. *Carlton McLendon Furniture Co.*, 488 F. 2d 58, 63 (5th Cir. 1974); *N. L. R. B.* v. *Houston Chronicle Publishing Co.*, 300 F. 2d 273 (5th Cir. 1962).

stated in *Alson Industries* v. *N. L. R. B.*, 523 F. 2d 470, 472 (9th Cir. 1975):

> "It is apparently the attitude of the Board that Alson had the burden of proving facts sufficient to require a new election in order to obtain a hearing, while the test is that Alson's burden was to present evidence sufficient to make a prima facie showing as to the alleged facts which, if true, would require a new election. It is obvious and the record shows that Alson could not obtain all the evidence required for a new election by way of affidavits. . . ."

Surely in this case the Sixth Circuit has approved just such a misplaced burden of proof, although couching its ruling in terms of "a lack of substantial and material factual issues." By rubber-stamping an administrative opinion based upon guesswork, the decision below conflicts with numerous decisions of other circuits.

The decision below is in conflict with other appellate court rulings in two additional ways. First, in approving the remarks of the Union organizer to the effect that one supervisor was fired for Union activity and that unit employees would lose their jobs if the Union did not prevail, the decision below squarely conflicts with the First Circuit's decision in *N. L. R. B.* v. *A. G. Pollard Co.*, 393 F. 2d 239 (1st Cir. 1968). In that case, the First Circuit enforced one Board order where the alleged misstatement was purely a prediction of future employer conduct. However, the court refused to enforce another Board order, wherein the Board also characterized the misstatement as a "mere prediction," because the union's prognostication was supplemented by a material misrepresentation lending credence to the "prediction" of employer reprisal, 393 F. 2d at 241-42:

> "By the same token we would affirm in No. 7015 if Stashio's statement had related solely to the employer's believed future intentions. The report of its past conduct, however, was not a prognostication, but a material fact

not lightly to be dismissed. What the company had done once it might be expected to repeat. . . .

* * * * *

"Discussion of this matter in the rubric of threats not within the union's power to carry out was inappropriate. These were not union threats. The question, as in N.L.R.B. v. Trancoa Chemical Corp., 1 Cir., 1962, 303 F.2d 456, 50 LRRM 2407, was simply whether there was a substantially inaccurate statement as to the existence of a material circumstance likely to influence the employees' voting and hence affecting their freedom of choice; in other words, whether there was a substantial and material misrepresentation likely to be believed."

It is significant to note that in *Pollard*, the First Circuit did not even order a hearing, apparently believing the effect of the misrepresentation so clear as to require no further analysis.

There can hardly be any question that here—where the election was won by one vote, where the Union organizer's statement could well be viewed as the product of special knowledge, and where his statements were reinforced by the equally damaging contemporaneous remarks of a former supervisor—an even more compelling case for a new election is presented than the situation in *Pollard, supra*. The Sixth Circuit's decision is thus in substantial conflict with *Pollard* and this Court should therefore grant this Petition.

Finally, the court below has departed from a consistent line of rulings requiring that the total effect of pre-election misconduct be considered in each case in determining whether a fair election has been held. As the Fifth Circuit stated in *Home Town Foods Inc.* v. *N. L. R. B.*, 379 F. 2d 241, 244 (5th Cir. 1967):

"The Regional Director took each of the employer's objections separately, and concluded that none of them would suffice to overthrow the election. It is not the effect of any one of the objectionable acts standing alone, however, but the combined effect of all of them, which must

be considered. N.L.R.B. v. Trancoa Chem. Corp., 1 Cir., 1962, 303 F.2d 456, 461, 3 A.L.R. 2d 879."

Accord, Argus Optics Co. v. *N. L .R. B.*, 515 F. 2d 939 (6th Cir. 1975); *N. L. R. B.* v. *Janler Plastic Mold Corp.*, ... F. 2d ....., 82 LRRM 2174 (7th Cir. 1972); *N. L. R. B.* v. *G. K. Turner Associates*, 457 F. 2d 484 (9th Cir. 1972); *Trade Winds Co.* v. *N. L. R. B.*, 413 F. 2d 1213 (5th Cir. 1969). Surely where, as here, the election was won by one vote the cumulative impact of all pre-election conduct must be weighed.

However, the court below has rubber-stamped a decision where the cumulative impact of the conduct in question has not only not been assessed, but rather has been studiously avoided. For example, the Regional Director, in assessing the effect of the Union organizer's statement that Petitioner intended to fire all unit employees, completely failed to consider the contemporaneous remark of Petitioner's former supervisor to the effect that the Union organizer was correct and that Petitioner did know who favored and who opposed the Union! Parsing this conversation into discrete parts in order to conclude that each part, standing alone, is innocuous is both unrealistic and precisely the type of administrative myopia which the federal appellate courts have traditionally sought to remedy by requiring an evaluation of the cumulative effect of all conduct. The Sixth Circuit's decision, approving a Board ruling which does not consider the total impact of pre-election misconduct in a case where the election was won by one vote, is a marked departure from the federal appellate court rulings, noted above, demanding a realistic assessment of the total impact of pre-election conduct by the National Labor Relations Board.

II. This Case Presents an Important Federal Question Which Has Not Been Settled by This Court.

The question primarily at issue in this case—that is, under what circumstances the National Labor Relations Board is required to hold a hearing on post-election objections—raises a substantial question of federal statutory and constitutional law[7] which has not been addressed by this Court. This Court's failure to consider and definitively resolve this question has allowed federal appellate courts to issue rulings, such as that appealed from here, where critical statutory and constitutional rights are sacrificed upon the altar of administrative convenience.

The question presented in this case is frequently faced by the federal appellate courts and concerns a crucial area of federal labor law, the very establishment of a collective bargaining relationship. In this area, the long line of appellate court rulings overturning Board orders based upon a failure to grant a hearing[8] eloquently testifies to the need for judicial supervision of often hasty administrative action. Petitioner submits that it is incumbent upon this Court to now resolve this question in order to remind the federal appellate courts—such as that below—of their responsibility to insure that procedural due process is not swept under the rug by a hard-pressed administrative agency and that a collective bargaining relationship be founded upon the true desires of the employees involved rather than upon fear of job loss kindled by the untrue statements of either party to the election.

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7. Numerous appellate courts have ruled that the constitutional standards for procedural due process are identical to the statutory requirements under the Board's own rules. *See, e.g., Trade Winds Co.* v. *N. L. R. B., supra; N. L. R. B.* v. *Smith Industries, Inc., supra; N. L. R. B.* v. *Bata Shoe Co.*, 377 F. 2d 821 (4th Cir.), *cert. denied*, 389 U. S. 917 (1967).

8. These cases are cited at pages 9-10 of Petitioner's initial brief to the court below and in the interest of brevity are not recited here.

This Court's analysis of the role of the federal appellate courts in *Universal Camera Co.* v. *N. L. R. B.*, 340 U. S. 474, 489-90 (1950) bears repeating here:

> "The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized.
>
> * * * * *
>
> "We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.
>
> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. . . ."

This admonition is all the more pressing where, as here, the abdication of judicial responsibility results in a denial of procedural due process guaranteed by the Constitution. Petitioner submits that in order to prevent further encroachments on fundamental statutory and constitutional rights, this Court should now resolve the question raised in this case and once again underscore the critical need for appellate court oversight of the National Labor Relations Board.

CONCLUSION.

Petitioner submits that the decision below is in conflict with the rulings of other federal appellate courts, presents an important federal question which has not been settled by this Court, and that for these reasons its Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 1, 1976.

APPENDIX A.

No. 75-1871.

UNITED STATES COURT OF APPEALS,
For the Sixth Circuit.

The Ypsilanti Press, Inc.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

ORDER.

Before: PECK, LIVELY and ENGEL, *Circuit Judges.*

This case is before the Court upon the petition of The Ypsilanti Press, Inc., to review an order of the National Labor Relations Board and upon the cross-petition of the Board to enforce the order, which is published at 219 NLRB No. 30. Reference is made to the reported decision of the Board for a detailed recitation of the facts. It is concluded that the election objections of The Ypsilanti Press, Inc. were properly overruled without a hearing, see, *e.g., N. L. R. B.* v. *Basic Wire Products, Inc.*, 516 F. 2d 261 (6th Cir. 1975), *N. L. R. B.* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 177-180 (6th Cir.), *cert. denied*, 389 U. S. 958 (1967), and that substantial evidence on the record as a whole supports the certification of the union and the finding that The Ypsilanti Press, Inc. violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. § 158(a)(5) and (1), and therefore

It is ordered that the order of the Board be enforced.

Entered by Order of the Court.
/s/ JOHN P. HEHMAN,
Clerk.

APPENDIX B.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

NATIONAL LABOR RELATIONS ACT.

Sections 8(a)(1) and 8(a)(5).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 10(f).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be

forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS.

29 C. F. R. § 102.69(d).

"(d) The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under sections 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under section 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith."

29 C. F. R. § 102.69(f) (in pertinent part).

"(f) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both

if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions arise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and case to be served on the parties a notice of hearing on said exceptions before a hearing officer. . . ."

APPENDIX C.

UNITED STATES OF AMERICA,
BEFORE THE NATIONAL LABOR RELATIONS BOARD.

The Ypsilanti Press, Inc. and Newspaper Drivers and Handlers Local 372, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.	Case 7-CA-11840.

DECISION AND ORDER.

Upon a charge filed on March 12, 1975, by Newspaper Drivers and Handlers Local 372, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on the Ypsilanti Press, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on April 4, 1975, and on April 15, 1975, issued an amendment to complaint against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 21, 1975, following a Board election in Case 7-RC-12600 the Union was duly certified

as the exclusive collective bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 3, 1975, and particularly on or about April 11, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter Respondent filed its answer to the complaint and amendment to answer admitting in part, and denying in part, the allegations in the complaint.

On April 28, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Thereafter, by letter dated May 2, 1975, the Union joined in support of the General Counsel's motion. Subsequently, on May 12, 1975, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent has not filed a response to the Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment.

In its answer, Respondent denies the representative status of the Union and admits its refusal to bargain upon the Union's

1. Official notice is taken of the record in the representation proceeding, Case 7-RC-12600, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F. 2d 683 (C. A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F. 2d 26 (C. A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D. C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F. 2d 91 (C. A. 7, 1968); Sec. 9(d) of the NLRA.

request because the Board has erred in certifying the results of the election in representation Case 7-RC-12600. Counsel for the General Counsel alleges that Respondent cannot now relitigate representation issues which were or could have been litigated in the prior representation proceeding. We agree.

Our review of the record in the representation case shows that after a hearing the Regional Director for Region 7, on October 23, 1974, issued a Decision and Direction of Election in which he ordered an election in the appropriate unit. A secret ballot election was conducted on November 22, 1974, which resulted in four votes cast for the Union, two against, with two challenged ballots determinative of the election. The Respondent filed timely objections alleging, in substance, that (1) there was supervisory involvement in supporting the Union during the organizing drive and election campaign; (2) the Union made threats that if employees did not vote for the Union they would be fired by Respondent; (3) statements were made by the Union on election day that it would overturn the results of the election if it was unsuccessful; and (4) the Union made statements which led employees to believe their ballots would not be secret.

After investigation of the challenges and objections, the Regional Director issued a Supplemental Decision on Challenged Ballots and Objections to Conduct Affecting the Election, Revised Tally of Ballots and Certification of Representative, in which he sustained the challenge to one ballot thereby causing the remaining challenged ballot to be nondeterminative of the election, overruled the Respondent's objections, and, in light of his finding that a majority of valid votes were cast in the Union's favor, certified the Union as exclusive representative of all the employees in the unit.

Thereafter, on March 6, 1975, Respondent filed exceptions[2] to the Regional Director's Supplemental Decision in which it al-

2. Under Secs. 102.69 and 102.67 of the Board's Rules and Regulations, Series 8, as amended, this was treated as a request for review.

leged its objections to the election should have been sustained and the election vacated or in the alternative a hearing should have been held because the objections raised substantial and material issues of fact. Respondent also alleged that both challenged ballots should have been opened and counted. On April 4, 1975, the Board, by telegraphic order, denied Respondent's request for review because it raised no substantial issues warranting review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8 (a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact.

I. The Business of the Respondent.

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of Michigan. At all times material herein, Respondent has maintained an office and place of business at 20 East Michigan

3. See *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Avenue in the city of Ypsilanti, Michigan, the only facility involved in this proceeding where it is engaged in publishing a daily newspaper and related operations. During the year ending December 31, 1974, a representative period, Respondent in the course and conduct of its business operations had a gross revenue in excess of $200,000 and held membership in or subscribed to various interstate news services, published nationally syndicated features, advertised various nationally sold products, and purchased and caused to be transported and delivered directly from points located outside Michigan to its Ypsilanti place of business newsprint, ink, and other goods and materials valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved.

Newspaper Drivers and Handlers Local 372, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. *The Representation Proceeding.*

1. The Unit.

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time circulation department district manager employees employed by the Employer at or out of its premises at Ypsilanti, Michigan; but

excluding office clerical employees, technical employees, professional employees, managerial employees, motor route district manager, promotion man, guards and supervisors as defined in the Act.

2. The Certification.

On November 22, 1974, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on February 21, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal.*

Commencing on or about February 24, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 3 and April 11, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since March 3, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy.

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F. 2d 600 (C. A. 5, 1964), *cert. denied* 379 U. S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F. 2d 57 (C. A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law.

1. The Ypsilanti Press, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Newspaper Drivers and Handlers Local 372, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time circulation department district manager employees employed by the Employer at or out of its premises at Ypsilanti, Michigan; but excluding office clerical employees, technical employees, professional employees, managerial employees, motor route district manager, promotion man, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 21, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 3, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Ypsilanti Press, Inc., Ypsilanti, Michigan, its officers, agents, successors, and assigns, shall:

1. Ceae and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Newspaper Drivers and Handlers Local 372, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time circulation department district manager employees employed by the Employer at or out of its premises at Ypsilanti, Michigan; but excluding office clerical employees, technical employees, professional employees, managerial employees, motor route district manager, promotion man, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Ypsilanti, Michigan, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on

4. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading

forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., July 18, 1975.

John H. Fanning,

Member,

Howard Jenkins, Jr.,

Member,

National Labor Relations Board.

(SEAL)

Chairman Murphy, dissenting:

I would have granted review and directed a hearing on Employer's Objection 1; therefore, I cannot join my colleagues in finding that Respondent violated Section 8(a)(5) in refusing to bargain.

Dated, Washington, D. C., July 18, 1975.

Betty Southard Murphy,

Chairman,

National Labor Relations Board.

"Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX.

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

We Will Not refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Newspaper Drivers and Handlers Local 372, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We Will, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time circulation department district manager employees employed by the Employer at or out of its premises at Ypsilanti, Michigan; but excluding office clerical employees, technical employees, professional employees, managerial employees, motor route district manager, promotion man, guards and supervisors as defined in the Act.

THE YPSILANTI PRESS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313—226-3200.

No. 75-1758

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE YPSILANTI PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
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Deputy Associate General Counsel,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not officially reported. The decision and order of the National Labor Relations Board is reported at 219 NLRB No. 30 (Pet. App. A5-A16).

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1976. The petition for a writ of certiorari was filed on June 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly rejected petitioner's objections to a representation election without holding an evidentiary hearing.

STATEMENT

1. On August 14, 1974, the Newspaper Drivers and Handlers Local 372 (the "Union"), an affiliate of the International Brotherhood of Teamsters, filed a representation petition seeking certification as the exclusive bargaining agent of petitioner's circulation department employees (A. 4). In November 1974, the Regional Director of the National Labor Relations Board conducted an election among the employees, in which four ballots were cast for the Union, two were cast against it, and two ballots were challenged by the Union (A. 19-20).[1] Petitioner then filed timely objections to the election, alleging that (1) supervisors had been involved in the Union's organizing campaign; (2) the Union had threatened that, if employees did not vote for the Union, they would be fired by petitioner; (3) the Union had stated on election day that it would overturn the election if it lost; and (4) the Union had made statements which led employees to believe that their ballots would not be secret (A. 16-17).

Based on an administrative investigation, the Regional Director sustained one ballot challenge on the ground that the voter had not been on the payroll during the eligibility period;[2] in light of this finding, the other challenge was not resolved because it could not have affected the results of the election (A. 20-21). Additionally, the Regional Director overruled each of petitioner's

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[1]Following a hearing, the Regional Director previously had found that two of petitioner's employees, George Owen and Robert Nordquist, were supervisors and were thus excluded from the unit (A. 10-11). "A." refers to the joint appendix in the court of appeals and "S.A." to the supplemental appendix to the Board's brief in the court of appeals. A copy of each is being lodged with the Clerk of this Court.

[2]This finding is not in issue here.

objections to the election, making the following findings and conclusions:

Objection 1: Prior to the hearing on their supervisory status (see p. 2, n. 1, *supra*), and, indeed, prior to the filing of the petition for an election, supervisors Owen and Nordquist had suggested that other employees attend the Union's first organizational meeting. They also attended the meeting, and Nordquist drove one employee there (A. 22). Owen later obtained an authorization card from one employee who was not eligible to vote in the election (A. 23). On October 22, 1974, a month before the election, Owen was discharged by petitioner,[3] but he thereafter continued to solicit and secure other employee signatures (*ibid.*).

In the first half of September 1974, Nordquist informed Circulation Director Leo Munao that he and Owen had been the "spearheads" of the union drive (A. 26). Petitioner took no steps to prevent their organizing activity, nor did it inform its employees that it disapproved of the supervisors' actions (A. 26). Rather, petitioner conducted a vigorous anti-Union pre-election campaign and assured its employees that they could "work and talk against" the Union if they so desired (A. 26-27).[4]

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[3]Conflicting reasons for Owen's discharge were advanced in the election campaign. The Union contended that he was fired for union activity, while the Company contended that he was fired for cause. Since Owen was a supervisor, his discharge for union activity would not have violated the National Labor Relations Act, and the Regional Director therefore did not have to resolve the question of the reason for the discharge in refusing to issue a complaint based on his discharge (S.A. 3).

[4]Thus, a letter sent to the employees stated (A. 27):

> Question: If I am opposed to a union here at the Press, will I get into trouble if I work and talk against the Teamsters? Answer: No. You and every district manager can talk and work for or against the union. The law protects your right to express your opinion.

In view of Nordquist's and Owen's lack of supervisory authority over unit employees,[5] the vigorously contested and close question of their supervisory status, Nordquist's minimal involvement in union activity after the filing of the election petition, the nonsupervisory status of Owen when he solicited for the Union following his October 22 discharge, petitioner's inaction when advised of their organizational activity, and its own vigorous campaign against the Union, the Regional Director concluded that Nordquist's and Owen's union activity had not impaired the employees' free choice in the representation election (A. 22-27).

Objections 2 and 4: At a meeting with petitioner's employees on November 18, 1974, Union representative Elton Schade stated that supervisor Owen had been fired for union activity (A. 27). Schade also said that, because of the small size of the unit, petitioner was aware of who was for the Union and who was against it and was in the process of discharging union supporters. Schade asked the employees to vote for the Union in order to protect themselves (*ibid.*). Following these comments, an employee asked how petitioner would be aware of an individual employee's feelings about the Union since the election would be conducted by secret ballot. Another unit employee, who had formerly been a supervisor, responded that petitioner knew who was for the Union and that it frequently took "straw ballots" (A. 29).

The Regional Director concluded that the Union's assertions were typical campaign propaganda which the employees were capable of evaluating as such (A. 27-28). He noted that employees are aware that unions

[5]Nordquist and Owen did not supervise the day-to-day work of unit employees, but performed complementary work of a similar nature (A. 24-25).

generally have no access to an employer's reasons for discharge, that petitioner's claim that Owen had been fired for cause was well known, and that employees recognize that union predictions concerning future employer conduct are beyond the power of the union to fulfill (A. 28). The Regional Director also concluded that the employees' first-hand observation of the election held by the Board would have allayed any fears about the secrecy of their ballots (A. 29).

Objection 3: At a conference held just prior to the beginning of the election, Union representative Schade accused petitioner of having threatened employees with discharge should they attempt to vote and stated that, because these threats had been prejudicial to the holding of a free election, the Union would file objections if it lost the election and would thereby cause the election to be set aside (A. 28). The Regional Director found that this statement amounted to nothing more than an announced determination to use the Board's objection procedures and did not constitute improper electioneering that would impair a fair election (A. 28).

Accordingly, the Regional Director overruled petitioner's objections and certified the Union as the bargaining representative of petitioner's circulation department employees (A. 29-30). On March 5, 1975, petitioner filed exceptions with the Board, contending that its objections should have been sustained and the election vacated or, in the alternative, that a hearing should have been held on its objections (A. 31-65). On April 4, 1975, the Board denied petitioner's request for review (A. 83). When petitioner continued to refuse to recognize the Union, the Board concluded on July 18, 1975, that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. 158(a)(5) and (1), and ordered

petitioner to bargain with the Union upon request (Pet. App. A5-A14).[6]

2. The court of appeals upheld the Board's decision and enforced its order. On the basis of prior decisions of the Sixth Circuit, the court concluded that "the election objections of [petitioner] were properly overruled without a hearing, * * * and that substantial evidence on the record as a whole supports the certification of the union" and the Board's finding that petitioner had committed an unfair labor practice (Pet. App. A1).

ARGUMENT

1. Petitioner contends that it was entitled to an evidentiary hearing on its objections to the representation election. Although the National Labor Relations Act does not provide for post-election hearings to resolve challenges or objections to an election, Section 102.69(d) of the Board's Rules and Regulations, 29 C.F.R. 102.69(d), provides for a hearing where an administrative investigation reveals that "substantial and material factual issues exist." Thus, the sole question presented is whether the Board properly concluded that petitioner's objections raised no "substantial and material factual issues" and could be determined without the necessity for an evidentiary hearing. This issue, which depends upon an evaluation of the particular facts of this case, does not warrant review by this Court.

In any event, the Board acted properly in denying a hearing. In order to raise a substantial and material factual issue under 29 C.F.R. 102.69 (*National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (C.A. 6), certiorari denied, 389 U.S. 958)—

[6]Chairman Murphy dissented, stating that she would have directed a hearing on petitioner's Objection 1 (Pet. App. A14).

> it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Director. * * * It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. * * * Mere disagreement with the Regional Director's reasoning and conclusions do not raise "substantial and material factual issues."

See also *National Labor Relations Board* v. *Southern Health Corp.*, 514 F. 2d 1121, 1126 (C.A. 7); *National Labor Relations Board* v. *Modine Manufacturing Co.*, 500 F. 2d 914, 915 (C.A. 8); *National Labor Relations Board* v. *Kenny*, 488 F. 2d 774, 775-776 (C.A. 9).

Here, petitioner did not dispute the underlying facts found by the Regional Director, but merely contested the inferences and legal conclusions drawn from those facts. But as this Court noted in *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17, 48-49, quoting from *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798, 800, "the statutory plan for an adversary proceeding 'does not go beyond the necessity for the production of evidential facts. * * * An administrative agency * * * may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven.' "

Moreover, contrary to petitioner's contention (Pet. 8), the Board was not required to demonstrate the actual effect of the pre-election conduct in question, but needed only to make an intelligent judgment, based upon its expertise, concerning the likely impact of that conduct

on the employees. In this inquiry, as the court of appeals held in *National Labor Relations Board* v. *Southern Health Corp., supra,* 514 F. 2d at 1126, an evidentiary hearing would have been of little probative value:

> Testimony by voters as to their motivation in voting is likely not to be satisfactory or useful. Cf. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 608 * * *. The more likely character of evidence tending to show that a particular statement probably had an impact on the outcome would be evidence that an issue to which it related was hotly contested and an important concern of the electorate, evidence bearing upon the degree to which the relevant facts are known among the group involved, and evidence tending to establish the magnitude of the alleged misrepresentation.

The Regional Director took these and others factors into consideration in overruling petitioner's objections, and the Board's determination to adopt those findings without an evidentiary hearing was not an abuse of discretion. See *Harlan No. 4 Coal Co.* v. *National Labor Relations Board,* 496 F. 2d 117, 122-123 (C.A. 6), certiorari denied, 416 U.S. 986; *National Labor Relations Board* v. *Clearfield Cheese Co.,* 322 F. 2d 89, 93-94 (C.A. 3).

Nor does the decision below conflict with the cases cited by petitioner (see Pet. 8, n. 6), each of which is distinguishable on its facts. Unlike here, the record in those cases was barren of any indication or inference that the employees had the requisite knowledge to evaluate the false pre-election propaganda effectively. In *National Labor Relations Board* v. *A.G. Pollard Co.,* 393 F. 2d 239, 241-242 (C.A. 1), for example, Stashio, the union's leading nonprofessional organizer, had informed a

"significant number" of unit employees on the night before and the morning of the representation election that, in a previous election in which he had been involved, the company had discharged nine of sixteen employees after the union had lost the election. The court there held that the statements may have had a significant impact on the voters in the election, who had no other knowledge of the subject matter of Stashio's representations. In the instant case, on the other hand, the Union's allegations concerning the discharge of Owen had been part of an open debate between the Union and petitioner about petitioner's treatment of a supervisor known to each of the unit employees.[7]

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[7]Furthermore, petitioner's assertion (Pet. 8) that Union representative Schade's comments (see p. 4, *supra*) were "*prima facie* objectionable" and hence warranted a hearing to determine the impact that such allegedly improper conduct had on the employees rests on a characterization of those remarks that was neither accepted by the Board or the court of appeals nor supported by the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
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Deputy Associate General Counsel,
National Labor Relations Board.

JULY 1976.

DOJ-1976-07